

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

4 PROFECTUS TECHNOLOGY,) Docket No. WA 20-CA-101 ADA
5 LLC)
6 vs.)
7 GOOGLE, LLC) Waco, Texas
8)
9) May 29, 2020

10 TRANSCRIPT OF TELEPHONIC SCHEDULING CONFERENCE
11 BEFORE THE HONORABLE ALAN D. ALBRIGHT

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33 Proceedings reported by computerized stenography,
34 transcript produced by computer-aided transcription.

15:16:05 1 THE CLERK: Telephonic scheduling conference in
15:16:07 2 Civil Action W-20-CV-101, styled, Profectus Technology,
15:16:13 3 LLC vs. Google, LLC.

15:16:15 4 THE COURT: Good afternoon, everyone.

15:16:17 5 If I could hear from plaintiff's counsel first
15:16:20 6 and then, defense counsel.

15:16:24 7 MR. ROSS: Thank you, your Honor.

15:16:25 8 This is Steven Ross, lead counsel for Plaintiff
15:16:27 9 Profectus. With me here on the phone is my co-counsel,
15:16:32 10 Mr. Casey Griffith.

15:16:37 11 Would the Court like us to get into more
15:16:39 12 substantive matters now? Or would the Court like to hear
15:16:41 13 from appearances from defendant's counsel?

15:16:46 14 THE COURT: I would. The latter, please.

15:16:52 15 MS. AMSTUTZ: Good afternoon, your Honor.

15:16:53 16 This is Paige Amstutz for Scott, Douglass,
15:16:56 17 McConnico on behalf of Defendant Google. I am here with
15:16:59 18 my co-counsel, Stephanie Skaff, Eugene Mar and Dan
15:17:05 19 Callaway from Farella, Braun & Martel. And also with us
15:17:08 20 is Don Wong from Google.

15:17:10 21 THE COURT: Very nice.

15:17:11 22 And I always like to give a little bit of a
15:17:15 23 shout-out whenever counsel or inhouse folks appear at my
15:17:21 24 hearings. I think it's important to what we do that
15:17:26 25 inhouse folks, whether they be clients or inhouse counsel,

15:17:29 1 attend and knows what's going on. So I appreciate anyone
15:17:32 2 who attends in that manner.

15:17:35 3 So my understanding is that you all have agreed
15:17:37 4 to a Markman date of January 7th; is that correct?

15:17:45 5 MR. ROSS: Your Honor, this is Steven Ross for
15:17:47 6 plaintiff.

15:17:48 7 I think that that is the date that we've arrived
15:17:54 8 at by default. Plaintiff would prefer December 3rd, but I
15:18:00 9 understand that defendant's counsel is only available on
15:18:03 10 January 7th.

15:18:05 11 THE COURT: Okay. Well, then, let's do it
15:18:07 12 January 7th. It's not going to delay your trial by very
15:18:12 13 much. I could tell you that. I sound like I'm talking
15:18:19 14 like the president now: I can tell you that.

15:18:20 15 So for that, is there anything we need to take up
15:18:23 16 from the plaintiff's perspective with respect to the
15:18:24 17 Markman?

15:18:28 18 MR. ROSS: Your Honor, I believe we should get
15:18:29 19 into the issue of briefing, which has actually been raised
15:18:32 20 by Defendant Google.

15:18:35 21 THE COURT: Okay.

15:18:39 22 MR. CALLAWAY: And, your Honor, I'm happy to
15:18:41 23 speak to that. This is Dan Callaway for Google.

15:18:43 24 THE COURT: Okay.

15:18:44 25 MR. CALLAWAY: I don't expect to belabor this.

15:18:46 1 We had discussed with plaintiff the possibility
15:18:49 2 of agreeing to a Markman briefing schedule that would
15:18:53 3 include just one opening brief, one response, a reply and
15:18:57 4 potentially sur-reply on indefiniteness issues.
15:19:02 5 Unfortunately, we did not reach agreement as to that
15:19:04 6 proposal, so I'm certainly not inclined to press that
15:19:09 7 proposal at this time, in view of the Court's preference
15:19:11 8 for simultaneous briefing.

15:19:13 9 We don't have an agreement as to any arrangement
15:19:16 10 to substitute for your order governing proceedings. So I
15:19:23 11 think at this time, we would just go ahead with your order
15:19:25 12 governing proceedings and the simultaneous briefing
15:19:28 13 outlined there.

15:19:28 14 THE COURT: Okay. And, Mr. Ross, what do you say
15:19:30 15 to that?

15:19:31 16 MR. ROSS: Your Honor, we agree. We prefer the
15:19:34 17 Court's default briefing schedule and page limits as set
15:19:38 18 out in the order governing proceedings.

15:19:41 19 THE COURT: Well, that's why we have it.

15:19:43 20 Is there anything else that we could take up on
15:19:47 21 behalf of plaintiff?

15:19:49 22 MR. ROSS: Your Honor, there is one other issue.

15:19:50 23 As the Court may know, Google has filed a motion
15:19:52 24 to transfer this case to the Northern District of
15:19:56 25 California. The plaintiff's response is due to be filed

15:20:02 1 on June 2nd, next week. We have indicated to defense --
15:20:11 2 defendant's counsel that we would like to seek leave of
15:20:13 3 court to conduct some expedited venue discovery in support
15:20:18 4 of plaintiff's opposition to the motion to transfer.

15:20:23 5 Earlier this week, we sent over a set of five
15:20:28 6 interrogatories, ten document requests, and a proposed
15:20:32 7 Rule 30(b)(6) deposition notice. Our current intent is to
15:20:38 8 file our motion on or before June 2nd for the expedited
15:20:45 9 discovery. And we will attach that discovery to our
15:20:47 10 motion. I just wanted to make the Court aware of what our
15:20:53 11 plans are and see if the Court would like us to proceed in
15:21:00 12 any other manner on this issue.

15:21:06 13 THE COURT: Have you all -- let me make sure I
15:21:09 14 understand.

15:21:10 15 Have the plaintiffs actually provided to Google
15:21:13 16 or counsel for Google, I guess, the specific discovery
15:21:18 17 that you would like to send them? Have you provided it --
15:21:24 18 do they know what's coming?

15:21:26 19 MR. ROSS: Yes, your Honor. We served them with
15:21:27 20 that discovery two days ago.

15:21:29 21 THE COURT: Okay. So it is almost automatic in
15:21:36 22 my court to allow this kind of discovery when a defendant
15:21:40 23 files a motion to transfer like as Google has done. So
15:21:45 24 let me hear from counsel for Google, if you have any
15:21:48 25 specific concerns with respect to the discovery that has

15:21:54 1 been sent to you by the plaintiff.

15:21:56 2 MS. AMSTUTZ: And, your Honor, this is Paige
15:21:58 3 Amstutz. I can speak to that.

15:21:59 4 We did get it a couple of days ago. We are
15:22:02 5 looking at a very specific request to see if we do have
15:22:06 6 any issue with them because we know the Court's tendency
15:22:11 7 is to allow that discovery. We're still in that process
15:22:14 8 with the hope we can reach resolution, but we know that if
15:22:16 9 we cannot, we come to the Court for some guidance.

15:22:19 10 THE COURT: Mr. Ross, typically -- and I
15:22:21 11 apologize if you've been in my court before. I don't -- I
15:22:24 12 just can't remember at this point. But I think what Ms.
15:22:30 13 Amstutz just said is -- I mean, she has been in my court a
15:22:34 14 lot, so I'm sure she's advised Google how I would probably
15:22:39 15 rule.

15:22:39 16 I would advise you to very quickly chat with the
15:22:44 17 folks who are representing Google. If they have any
15:22:48 18 specific issues with the discovery, not whether or not
15:22:51 19 they're going to answer discovery at all, but specific
15:22:53 20 issues, you folks try to work that out. If you can't work
15:22:58 21 it out, you need to represent your client, Mr. Ross.
15:23:03 22 Google needs to have their lawyers represent them.

15:23:06 23 Just contact Josh Yi. Or if there is a specific
15:23:10 24 discovery request, interrogatory, or anything that you
15:23:15 25 sent, maybe the categories for the 30(b)(6), or whatever,

15:23:19 1 if you all are fighting over any of those, just, you know,
15:23:22 2 send -- tell Josh Yi what it is that you're fighting over.
15:23:26 3 I may not even need a hearing, I may just rule on it. But
15:23:30 4 you guys try and work that out by the end of the week.
15:23:33 5 Next Friday -- if you realize before next Friday -- that's
15:23:37 6 a week from today, not today. If you all realize that
15:23:41 7 that's -- I don't want you spending three days trying to
15:23:44 8 work this out. If you can work it out, great. If you
15:23:47 9 can't work it out, that's fine with me, too. Just let
15:23:50 10 Josh know.

15:23:50 11 But I'm going to allow discovery. It's just if
15:23:55 12 Google has a specific concern with the discovery that you
15:23:59 13 sent, I'm certainly happy to take that up.

15:24:02 14 Mr. Ross, does that take care of that issue?

15:24:06 15 MR. ROSS: Just for point of clarification, your
15:24:10 16 Honor, it's my understanding that a motion for leave to
15:24:14 17 conduct this discovery is not necessary; is that correct?

15:24:18 18 THE COURT: It is.

15:24:21 19 MR. ROSS: Thank you, your Honor.

15:24:23 20 THE COURT: And if that's not clear from my local
15:24:26 21 rules, it will -- I will address that in my local rules,
15:24:31 22 and we'll make it so it is clear.

15:24:34 23 MR. ROSS: Thank you, your Honor.

15:24:35 24 THE COURT: You bet. Anything else?

15:24:40 25 MR. ROSS: That's all from the plaintiff's side,

15:24:42 1 your Honor.

15:24:42 2 THE COURT: Anything for Google?

15:24:47 3 MR. CALLAWAY: For Google, your Honor, again,

15:24:49 4 this is Dan Callaway.

15:24:51 5 Just by way of sort of status, we are in the
15:24:53 6 process of negotiating a protective order with plaintiff.

15:24:57 7 I won't belabor the specifics of that. I think we're
15:24:59 8 working on it. And then, Google is interested in
15:25:03 9 discussing with the plaintiff a stipulated reduction of
15:25:07 10 the default discovery limit. This is a single-patent case
15:25:10 11 and a relatively limited universe of accused products.
15:25:18 12 The plaintiff's LLC only has two members, so we anticipate
15:25:21 13 modest discovery on that front and are interested in
15:25:26 14 reducing the default discovery limits for this case.

15:25:30 15 But I sense that that's premature on this call
15:25:33 16 because discovery is effectively stayed until after
15:25:36 17 Markman, notwithstanding the venue discovery that was just
15:25:39 18 discussed.

15:25:41 19 THE COURT: That's correct.

15:25:42 20 And the only discovery I permit in advance of the
15:25:46 21 Markman hearing is either the discovery on venue --
15:25:50 22 because I believe the defendant in this case, and
15:25:53 23 rightfully so, has put into question whether or not the
15:25:56 24 case should be transferred, and so, that's why I allow
15:25:59 25 that.

15:26:00 1 And any other discovery that might be directly
15:26:03 2 relevant to Markman, for example, if the plaintiff wanted
15:26:07 3 to contend that they needed source code to do their
15:26:11 4 infringement contentions, I would find that type of
15:26:14 5 discovery acceptable, as well. But all other routine
15:26:17 6 discovery is stayed until the Monday after the Markman.

15:26:26 7 MR. ROSS: Very good, your Honor.

15:26:28 8 THE COURT: Is there anything else we need to
15:26:29 9 take up for Google?

15:26:35 10 Okay. I hope you all be safe out there. Have a
15:26:37 11 wonderful weekend. And I will forward -- I hope I see at
15:26:41 12 least some of you way before we have the Markman hearing.
15:26:43 13 And just let us know whenever -- let me tell you one more
15:26:48 14 thing quickly.

15:26:49 15 Google, you have filed -- I'm just terrible to
15:26:56 16 address people for their -- counsel for Google. I
15:26:58 17 apologize. The motion to transfer has been filed; is that
15:27:01 18 correct?

15:27:04 19 MR. CALLAWAY: It is, your Honor.

15:27:06 20 MS. AMSTUTZ: That's correct.

15:27:07 21 MR. CALLAWAY: We had filed that motion.

15:27:08 22 THE COURT: Okay. When that motion is ripe,
15:27:11 23 whatever that means in this case, either when you all file
15:27:14 24 a reply or when you know the plaintiffs are done and are
15:27:18 25 or are not going to file a sur-reply, I'm going to put the

15:27:21 1 burden on you to just have someone contact the Court and
15:27:25 2 let us know that the motion is ready for us to consider.
15:27:29 3 What you should anticipate is us addressing it
15:27:34 4 pretty quickly after we know that it's ripe, and if we
15:27:38 5 believe we need a hearing on it, then we'll set a hearing
15:27:43 6 pretty quickly. Given travel issues that are going on
15:27:49 7 right now, I would be happy to conduct that hearing in a
15:27:53 8 manner that's safe and productive for all parties. We
15:27:59 9 could do it by telephone. We could do it be Zoom. We
15:28:04 10 could do it with some people in person and some people by
15:28:07 11 phone. So we'll take that up down the road if I decide we
15:28:11 12 need a hearing.

15:28:11 13 But as soon as the motion is ready to be
15:28:13 14 considered, I'd like for counsel for Google to let the
15:28:17 15 Court know.

15:28:17 16 Is that okay?

15:28:21 17 MS. AMSTUTZ: That's fine.

15:28:22 18 MR. CALLAWAY: Yes, your Honor.

15:28:24 19 MR. ROSS: Understood.

15:28:24 20 THE COURT: Okay. You guys have a wonderful
15:28:25 21 weekend. Take care. Bye.

15:28:28 22 (End of proceeding.)

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